

SOUTH AFRICA / JUDGMENT

Motlafi v State (A09/2020) [2021] ZALMPPHC 44 (13 August 2021)

[2021] ZALMPPHC 44**COURT**

Limpopo High Court, Polokwane

BEFORE

AML Phatudi, MV Semanya

CASE / FILE NUMBER

A09/2020

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INTHE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION-POLOKWANE

CASE NUMBER: A09/2020

POLLYCARPOUS MORITHI MOTLAFI APPELLANT AND THE STATE RESPONDENT

JUDGEMENT

AML PHATUDI J

Introduction

- [1] One count of housebreaking with intent to commit an offence[1] and one of rape as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007[2], were preferred against the appellant at Groblersdal Regional Court- per Mr G Mogotlane. (Trial court)
- [2] The trial court found the appellant guilty as charged. The sentences of 5 and 15 years' imprisonment followed the guilty verdict on housebreaking and rape respectively. Two years of 5 years' imprisonment was ordered to run concurrently with the sentence imposed for rape. The appellant was effectively imprisoned to 18 years.

- [3] The appellant's leave to appeal against both the convictions and sentences were shown off the hand by the trial court. Saddened by the refusal for leave to appeal, the appellant petitioned the Judge President of this division. The High Court (MG Phatudi and Kganyago JJ) granted the appellant leave to appeal against both convictions and sentences imposed by the trial court.
- [4] This is thus an appeal against both convictions and sentences. The appellant adumbrated the trial court's errors and misdirection(s) in the notice to appeal.

Grounds of appeal

- [5] The appellant's grounds of appeal are, in short, (i) that the trial court failed to consider the state's failure to lead evidence on how the appellant's saliva was obtained, by whom, when and where, in finding the appellant guilty and (ii) that the trial court erred in accepting the state's evidence that the fingerprints uplifted on the crime scene are that of the appellant.
- [6] The grounds of appeal in respect of the sentences imposed were abandoned by counsel from the bar, as instructed. The appeal is thus, only against convictions.

Factual

background:

- [7] The state, in its quest to proof the guilt of the appellant beyond reasonable doubt, led the evidence through the testimonies of several witnesses. Their evidence demonstrates that, in the middle of the darkest night of 10 February 2013, an assailant broke into the house in which the 66-year-old M[...] M[...] N[...] was in and, wherein after, a sexual offence was perpetrated on her.
- [8] The assailant and perpetrator left some pointers at the crime scene which were uplifted and collected. The first pointer is the fingerprint uplifted from inside the bathroom window which does not open. The fingerprint was facing downward. There were no other prints uplifted at the scene. The second pointer is the discharge found in the complainant's vaginal vault which was collected by the doctor. The doctor collected some swabs, packaged and sealed them before they were handed to the police in charge. The swabs were taken to Forensic Scientific Laboratory for further investigation.
- [9] The investigations conducted on both pointers alluded to above, positively matched those of the appellant.
- [10] The appellant denies that the fingerprint uplifted from the inside window of the property that was broken into, is his. He further denies having ever perpetrated a sexual offence on the complainant.
- [11] The question to be determined is whether the state proved its case beyond reasonable doubt the guilt of the appellant.

The Law and legal principles applicable

[12] As a point of departure, the principle set in *R v Dhumayo and Another*[3] is that

‘A court of appeal must bear in mind that a trial court saw the witnesses in person and could assess their demeanour. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. The court of appeal will only reject a trial court’s assessment of evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court’s judgement must remain in place. The court of appeal does not zealously look for points upon which to contradict the trial court’s conclusions, and the fact that something has not been mentioned does not in itself mean that it has been overlooked.’[4]

[13] It is trite law that an appeal court decides the appeal on the facts before it as contained within the four corners of the record of appeal. The appeal court is thus duty bound to establish from the record, if the trial court has either misdirected itself on facts or has applied the law erroneously to the facts. The appellant bears the onus to satisfy this appeal court that the trial court misdirected itself and/or erred when assessing the evidence based on the facts and the law before it[5].

Evaluation: Ad conviction: Housebreaking

[14] I find it apposite to first deal with the conviction relating to the housebreaking count, more specifically, the evidence in respect of the fingerprints uplifted at the crime scene.

[15] Henry Micheal Makhoba, a police officer of 27 years’ service in the South African Police Service, attached to the Criminal Records Centre, who specialise in investigating fingerprints and forensic investigations, testified on how he uplifted the fingerprint from the inside of a window of a property in which it is alleged the offence was perpetrated. He kept the exhibits under lock and key in a safe. He later scanned the uplifted fingerprints to the fingerprint scan system. He discovered that the fingerprints were positive and they identified a person. He informed the investigating officer of the identity of the suspect. The investigating officer informed him that the identified person was arrested. He then proceeded to prepare the court chart.

[16] The charts he prepared for the court are: (i) The fingerprint of the middle finger uplifted from the window at the scene marked exhibit G. (ii) The fingerprints chart, commonly referred to as SAP192, with the fingerprint of the appellant taken on 14 March 2016, marked exhibit H. (iii) Exhibit J, being the fingers and palm print taken from the appellant for comparison purposes, was as well handed in as evidence. (iv) The last fingerprint was taken from the appellant on 3 April 2018 during trial and before court. The exhibit was handed in and marked K.

[17] Makhoba testified with reference to all seven points alluded to in the charts prepared for the court. He, after handing in exhibit K, demonstrated on how the seven points he found on the fingerprint uplifted from the window matches that of the appellant. He opined in his conclusion that the appellant is linked to the commission of the housebreaking offence based on the uplifted fingerprints from the window which he compared with that of the appellant. For ease of reference, this is how it was captured on record[6]:

‘Court: Right. You may proceed-

Makhoba: Yes, your worship, I was just reading the points which I did marked from point 1 to 3- all those points were marked as bifurcations on the court chart. Point 4 from photo 1 and 2 were a beginning or ending. Point 5 photo 1 and 2 also it is bifurcation. Point 6 on photo 1 and 2 – it is a beginning or ending. Photo 1 and 2 are marked point 7, which is bifurcation.

Court: Is that all?

Makhoba: That is all the points which I did marked on the court chart

Court: Okay

Prosecutor: Yes

Makhoba: No person Your Worship that can have the same fingerprint or footprint. That is why I have no doubt that it proves this one I did hand it in are belonging to the person which is in front of court.

[18] Counsel for the appellant submits, with emphasis to one of the grounds for the appeal, that the trial court erred by accepting the expert’s evidence as the expert failed to point out the place where the fingerprint were uplifted. He further submits that there is no evidence on record to show that the fingerprints were taken in court in the presence of the presiding officer.

[19] I am unable to comprehend why the appellant submits that Makhoba “failed to point out the place where the fingerprints were uplifted” whereas the evidence is overwhelming. It is evident from the record that the appellant questioned Makhoba about the place where the fingerprints were uplifted during cross examination. This is how it unfolded:

Mr Mokai: was the window opened or unopened –

[Makhoba]: Now Your Worship, if I can request, maybe to look on photo 6, to just check the window. I mentioned to the [indistinct] that where I lifted the fingerprint, the window is not a window that you can open, it was intact. The further part, the fingerprint was inside the window. Not from outside. It was inside... the print was facing down.’

[20] The trial court assessed and evaluated the evidence led. This is what the trial court said:

‘the testimony of the police officer (referring to Makhoba) is also clear. He says that he has an experiments in the fingerprint. He took the photos as well as the fingerprints... he says that he found the fingerprint on the inside of the window, but his expertise was never also put into dispute by the Defence, as he informed the court that he is a specialist in fingerprints.

[21] It is common cause that the fingerprint was uplifted at the scene and from the appellant. Comparison of the fingerprint uplifted at the scene and that of the appellant, including those taken from the appellant in court, was made. The prints uplifted from the scene positively matched those of the appellant as demonstrated through the evidence of Makhoba. The trial court, in my view, correctly assessed the evidence before it and this appeal court cannot “zealously look for points upon which to contradict the trial courts conclusions”. [7] The fact that something has not been mentioned, does not in itself mean that the trial court overlooked such fact. It must be borne in mind that a trial court saw the witnesses in person and could assess their demeanour. As indicated in Dhumayo [8], “if there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct.” The appellant’s ground has no basis. I am unable to find any error or misdirection on the part of the trial court. The conviction on this count should stand.

Evaluation: Ad Rape conviction:

[22] The appellant challenges the conviction on this count on the bases that the state failed to adduce evidence as to when and who took the buccal sample from the appellant and whether the person was authorised. He further stands on a ground that there is no evidence that the buccal sample, which was analysed and compared to the cervical OSCE swab, is that of the appellant. He, on that basis, submits that the trial court erred in accepting the analysis report of Captain Mashegoana in convicting the appellant.

[23] It is common cause that the complainant was alone in the house when a person broke in and perpetrated a sexual offence on her. The evidence demonstrates that the perpetrator did not use a condom. The evidence shows that the doctor who medically examined the complainant, found and collected “the discharge” from her vaginal vault. Immediately thereafter the doctor collected some swabs, packaged, sealed and sent them to the police in charge. The chain of evidence from collection of the swabs up to the evaluation at the forensic laboratory including the comparison, is not disputed. The question is when and who took the buccal samples from the appellant.

[24] Matukudu Samuel Mashegoana, a police officer attached to Forensic Science Laboratory in Pretoria, testified on how they analyse the samples that are subjected to DNA analysis. He displayed his expertise with distinction. He schooled the trial court on what the DNA is and how the DNA analysis process requires competence or skill in biology, which he has.

[25] He testified that they, at the Laboratory, “compare the results coming from the exhibits[9] with the results coming from the reference[10]”. He explained a full profile and a mixture result. For ease of reference, “a full profile is when there is a single donor to a genetic material” and a “mixture result is when there is more than one contributor”. He explains further that for a positive result to be realised, the DNA of the reference (the donor) is also found in the mixture.

[26] He testified that the person who donated the genetic material that was found on the cervical swab of the complainant was a male. He further said that when he says the result are a match, they simply mean that all the areas from the exhibit sample are exactly the same as all areas from reference sample.

[27] The issue to be determined is when and from whom was the reference sample taken that matched the complainant’s exhibit sample. I find it necessary to track this issue from the record. The determination of the issue was raised during cross-examination of Mashegoana which proceeded smoothly until when counsel for the appellant requested information pertaining to the exhibits and

references. This is how it came to the fore:

Mr Mokai: Okay can you provide the evidence regarding the actual testing?

Court: What do you mean evidence of the... what type of evidence do you want?... Actual evidence of testing of the samples. Which samples?

Mr Mokai: Samples. The one, the cervical swab and the, the one of the reference sample.
(Emphasis added)

[28] The trial court engaged appellant’s counsel from thereon. Counsel placed on record that the defence disputes certain evidence. It is not clear as to what the defence disputed. The trial court adjourned for production of certain documentation, among others, Electropherogram.

[29] The proceedings continued a month later. It appears from the record that the trial court was left discombobulated by the submissions made by both counsel for the state and the appellant’s, before counsel for the appellant could proceed with cross examination

pertaining to what led to the previous postponement. I find it inevitable to indicate how it transpired.

Prosecutor: No, he said he is not proceeding with it your worship. He saw the results.

Court: What?

Prosecutor: May the defence address the court. He is not going to proceed with it. I think he is satisfied.

...

Court: Okay, right, the Defence may proceed

Makhaya: As it is pleases the court your worship... after the request was made in respect of the electropherograms, we then received same and, we had an independent consultation with the doctor which we had an opinion your worship...And then after the consultation with the client and the doctor your worship, we will then not proceed in respect of the electropherograms results at this stage.

[30] In any event, counsel proceeded with his cross examination. It transpired that comparison was made using the exhibits and references

submitted to the laboratory. A linen found on the complainant's bed was among those references. Mashegoana was then asked during cross examination if the tests were done on the linen. This is what he said.

Okay two types of analysis were carried out on the linen. Firstly, we did what we call preliminary analysis. That is just to test if there is a possible genetic material on the exhibit. Then the result was positive. I tested positive for presumable semen. Then we subsequently analysed the DNA... we had the same DNA result as the DNA that was obtained on the swab that I mentioned on my table.

[31] It transpired from the questions and answers that the samples D5S818 showed that there is another contributor besides the reference

samples they had.

[32] There is no evidence from the record to show that the state did lead any evidence as to when and who collected the buccal reference sample (16DBAC628) from the appellant like they did with cervical swabs(09D1AB4676XX) collected by the doctor from the complainant. In the absence of such evidence on record, the State can be said to have failed to prove its case beyond reasonable doubt.

[33] In any event, the appellant freely and voluntarily supplemented the state's case when leading his evidence in chief. This is how the appellant brought the evidence to the fore:

Makhanya: Okay now you have listened to the complaint. The complainant said that the person who raped her did not use any condom, am I right? She went to the doctor, they took the vaginal swab, and then they say that that' swab matches yours. Is there also an error there?

Accused: That one is unknown to me. I only know about the blood extraction or a swab which were taken from me, but I do not know about the complainant's swab.

[34] The appellant testified further that on 29 November 2016, 'Mr Segala came with a [indistinct] that contained certain things. He took out those things and put them inside my mouth. He started me, he took out those things from my mouth and then he started writing them in a statement where he was saying I must sign. I was signing'.

[35] The appellant provided the answers to the question he raised in his notice to appeal. Mr Segala, a police officer in the employ of the South African Police Services, is the one who collected the buccal swabs from the appellant on 29 November 2016. This provides answers to the questions- when and who.

[36] The said buccal swab (reference) is the one used in comparison with the exhibits swabs. They tested positive in relation to the appellant.

[37] The appellant seemed not to have had a problem with the evidence on buccal samples collected from the appellant even during Mashegoana's testimony. The appellant "agreed", after having been provided with "documentation" used to compare the exhibits with the references, with the results from the Laboratory. This is demonstrated by the appellant, who, after having been provided with the "documentation" he required, consulted with his own expert who advised him promptly. He accepted Mashegoana's evidence. The evidence from the forensic laboratory places the appellant's "references" of which, as evidently collected from his saliva by Segala and semen uplifted from the black linen, matched those found on the

complainant's cervical OSCE swabs notwithstanding the mixed profile. If the appellant's self-incriminating evidence is admissible, then the appellant's appeal falls to be dismissed.

[38] Even if I may be wrong for having assessed the evidence holistically in accepting the State to have proven its case beyond reasonable doubt, an inference can still be drawn that the appellant is the assailant and perpetrator. The evidence placed on record is that the appellant's fingerprint is found on the inside of the window of the house (scene of the offence) where the complainant was in on the day the sexual offence was perpetrated.

[39] In *R v Blom*[11], Watermeyer JA settled the principle relating to circumstantial evidence- He penned that "in reasoning by inference in a

criminal case there are two cardinal rules of logic which cannot be ignored. The first rule is that the inference sought to be drawn must be consistent with all the proved facts: if it is not, the inference cannot be drawn. The second rule is that the proved facts should be such that they exclude every reasonable inference from the proved facts save the one sought to be drawn: if these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct (see *Sesetse* 1981 (3) SA 353 (A) at 369–370).

[40] In *S v Essack*[12] the Appellate Division developed the principle further by distinguishing between conjecture or speculation from positive proved facts from which the inference can be drawn. The court stated that '[i]nferences must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which is sought to be established. In some cases other facts can be inferred, which as much practical certainly as if they had had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of

inference fails and what is left is mere speculation as conjecture.’

[41] Rubbing it in, the court in *S v Reddy and others*[13] added that the circumstantial evidence needs to be considered in totality. The court stated that “in assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true”.

Conclusion

[42] The evidence led by the state demonstrate that there was no other perpetrator other than the appellant on the day and time when the offences were perpetrated. There can be no inference unless there are objective facts from which to infer the other facts which is sought to be established. In the absence of any other evidence consistent with all the proved facts upon which an inference can be drawn, it can safely be inferred that the appellant is the person who perpetrated the offences. The conviction of the appellant in respect of rape count should as well stand.

[43] The appellant abandoned his appeal against sentences. I loath to deal with the trial court’s sentences. The sentences imposed by the trial court should as well stand.

[44] I, in the result, would make the following order:

ORDER

44.1 The appellant’s appeal against convictions and sentences is dismissed.

AML PHATUDI

JUDGE OF THE HIGH COURT

I agree and it is so ordered

MV SEMENYA

DEPUTY JUDGE PRESIDENT

LIMPOPO DIVISION OF THE HIGH COURT

APPEARANCES FOR THE APPELLANT Mr. N.C. Malumbete INSTRUCTED BY: Malumbete and Makhubele Attorneys- C/O Director Makhafola Inc POLOKWANE malumbete@telkomsa.net FOR THE RESPONDENT Adv T. Mavundza INSTRUCTED BY DPP. Polokwane Tmavudza@npa.gov.za REGISTRAR-POLOKWANE: Vukati Khosa APPEALS, CRIMINAL vkhosa@judiciary.org.za HEARD 04 June 2021

JUDGEMENT

13 August 2021

Judgement delivered on:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 August 2021.

[1] In that the accused(s) is/are guilty of the offence of HOUSE BREAKING WITH INTENT TO COMMIT AN OFFENCE, read with sections 95(12), 256,257,262 & 263 of the Criminal procedure ACT, Act 51/1977 as amended. In that the accuse(s), upon 10 February 2013 and at or near Tafelkop, In the *District of ELIAS MOTSOALEDI * REGIONAL DIVISION of LIMPOPO, did unlawfully and intentionally break and enter the House of M[...] N[...] with the intent to COMMIT AN OFFENCE.

[1] In that the accused(s) is/are guilty of the offence of HOUSE BREAKING WITH INTENT TO COMMIT AN OFFENCE, read with sections 95(12), 256,257,262 & 263 of the Criminal procedure ACT, Act 51/1977 as amended.

In that the accuse(s), upon 10 February 2013 and at or near Tafelkop, In the *District of ELIAS MOTSOALEDI * REGIONAL DIVISION of LIMPOPO, did unlawfully and intentionally break and enter the House of M[...] N[...] with the intent to COMMIT AN OFFENCE.

[2] That the accused is/are guilty of the crime of contravening the provisions of Section 3 read with sections 1,2,50, 56(1), 57,58,59,60 and 61 of the Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007 as amended. Further read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 177. Further read with section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended. Further read with Section 120 of the Children's Act,38 of 2005. In that on or about the 10 February 2017 and at or near Tafelkop, in the Regional Division of Limpopo the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, M[...] M[...] N[...] 67 years by inserting his penis into her vagina.

[2] That the accused is/are guilty of the crime of contravening the provisions of Section 3 read with sections 1,2,50, 56(1), 57,58,59,60 and 61 of the Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007 as amended. Further read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 177. Further read with section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended. Further read with Section 120 of the Children's Act,38 of 2005.

In that on or about the 10 February 2017 and at or near Tafelkop, in the Regional Division of Limpopo the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, M[...] M[...] N[...] 67 years by inserting his penis into her vagina.

[3] 1948 (2) SA 678 (A)

[4] See: S v Robinson 1968 (1) SA 666 (A) @675 H; S v Hadebe and Others 1997 (2) SACR 641 (SCA) @ 645; S v Mononyane and Others 2008 (1) SACR 543 (SCA) [15]

- [5] See: Pillay v Krishner and Another 1946 SA 946 (A) page 941- G-h
- [6] Quoted verbatim (word for word).
- [7] R v Dhumayo 1948 (2) SA 678 (A)
- [8] Op cit
- [9] Swabs collected from the complainant
- [10] Buccal collected from the suspect(s) or donor.
- [11] 1939 AD 188 @ page 202 -203
- [12] 1996
- (2) SACR 1 (A) @ page 8 C-D see as well Sv Geasa. 1400/2016 (2017) ZASCA 92 (9 June 2017)
- [13] 1974
- (1) SA 1 (A)
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Prepared on 10 October 2026 · Esheria